IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1157

TOPPS CHEWING GUM, INC., *Petitioner,*

v.

FLEER CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Topps Chewing Gum, Inc. (hereafter "Topps") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The order of the Court of Appeals for the Third Circuit dismissing Topps' appeal in this case is included herein as Appendix * A and has not been officially reported. The district court's opinion and supplemental opinion are included herein as Appendix B and Appendix C respectively and have not been officially reported. An earlier opinion of the district court denying

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* Citations to the Appendix are referred to as App. —.

Topps' motion to dismiss is reported at 415 F.Supp. 176 (E.D. Pa. 1976).

JURISDICTION

The order of the Court of Appeals for the Third Circuit dismissing Topps' appeal in this case was entered on December 1, 1977. A timely Petition For Rehearing and Suggestions for Rehearing En Banc was denied on January 3, 1978. On January 16, 1978 the court of appeals stayed the issuance of the mandate, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, until February 23, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and under the doctrine of *Abney* v. *United States,* 431 U.S. 651 (1977).

THE QUESTION PRESENTED

Whether a pretrial order denying a motion for summary judgment on collateral estoppel grounds and thereby requiring a party to relitigate issues which have already been tried and decided in its favor, is appealable under 28 U.S.C. § 1291 as a "final decision" pursuant to the "collateral order" doctrine formulated in *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949) and applied in *Abney* v. *United States,* 431 U.S. 651 (1977).

STATUTE INVOLVED

28 U.S.C. § 1291 (1970) provides as follows:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone,

> the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

Fleer Corporation (hereafter "Fleer") instituted this antitrust action pursuant to 15 U.S.C. §§ 4 and 16 on June 24, 1975 in the Eastern District of Pennsylvania charging the defendants Topps and Major League Baseball Players Association (hereafter "Association") with having violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Topps manufactures and sells chewing gum and candy, as well as other low cost play items appealing to children and young teenagers. Many of its products comprise a package which includes bubble gum together with picture cards of a sports figure or other famous personality. Fleer is also a manufacturer of bubble gum and candy, and sells packages similar to those of Topps and in competition with it.

The complaint alleges that Topps, acting unilaterally and in combination with others including the Association, monopolized a six million dollar market for baseball picture cards and restrained trade therein essentially through the use of exclusive contracts between Topps and individual baseball players. These contracts are for a five year term and provide for a payment to the player for each year that the picture is used or that the player is in the major leagues. In all material respects, the contracts which Fleer challenges in this case are identical to those previously approved by the Federal Trade Commission.

The issue sought to be litigated by Fleer in this case (the legality of Topps' contracts under the antitrust

laws) has previously been litigated in a lengthy proceeding against Topps in which Fleer had an opportunity to and actually did participate, wherein the issue was decided in Topps' favor. On January 30, 1962, after at least three years of extensive investigation, the Federal Trade Commission (hereafter "FTC") instituted an action against Topps charging it with monopolization of the market for baseball picture cards and challenging Topps' contracts with baseball players as anticompetitive. *In the Matter of Topps Chewing Gum, Inc.,* 67 F.T.C. 744. After an additional three years of pretrial and trial proceedings, an initial decision by the Hearing Examiner was issued on August 7, 1964. 67 F.T.C. 747. In effect, Fleer litigated this case for the FTC. It was Fleer's letter to the Commission which initiated the investigation and subsequent proceedings.[1] The FTC found that Fleer's representatives were the star witnesses and undertook the burden of making the record in the proceedings by supplying a major portion of the testimony in support of the complaint. 67 F.T.C. at 756, 761, 777. Fleer filed legal briefs with the Hearing Examiner through its legal representatives and supplied much of the factual material for use by FTC counsel. Fleer's legal and corporate representatives were in constant attendance throughout the entire proceeding. 67 F.T.C. at 777. Fleer, however, failed to avail itself of its statutory right to intervene.

Both the FTC and Topps took cross appeals from the Hearing Examiner's initial decision which culminated in an order and accompanying opinion by the FTC dated April 30, 1965, dismissing the complaint.

[1] Many of the allegations in this letter, however, were subsequently rejected by the Hearing Examiner and the Commission.

67 F.T.C. 835. Basically, the FTC found that the market in which Topps had allegedly restrained and monopolized trade was not a proper relevant market for antitrust purposes because it was economically and commercially meaningless, and additionally that the contracts between Topps and baseball players were not unlawful.[2]

Based upon these prior proceedings, Topps moved to dismiss Fleer's recent complaint on the grounds of collateral estoppel, *i.e.,* since in a proceeding in which Fleer had an opportunity to and did participate, a finding was made by the FTC that Topps' contracts were lawful and that no legally cognizable relevant market for baseball cards had been found to exist, Fleer is now barred from relitigating these issues. Although the district court agreed with Topps' legal theory, the motion was denied on the ground that Topps was relying on facts not present in the complaint. *Fleer Corp.* v. *Topps Chewing Gum, Inc.,* 415 F.Supp. 176, 183 (E.D. Pa. 1976). After discovery had been conducted, limited *inter alia* to the issue of collateral estoppel, Topps filed a motion for summary judgment on this issue. This motion was also denied, although this time on the ground that Topps' legal reasoning (which was

[2] In its final decision, the FTC also found that Fleer had been able to sign a large number of baseball players to non-exclusive baseball picture contracts and specifically advised Fleer to continue competing with Topps for rights with baseball players. 67 F.T.C. at 842. Instead of heeding this advice and competing for baseball player contracts, after the FTC decision Fleer sold all of its contracts with baseball players to Topps for $395,000. Several years later, by initiating this treble damage action, Fleer seeks to recover more money from Topps.

identical to that used in its motion to dismiss and approved of by the court) was incorrect. App. B.[3]

Thereafter, Topps filed a timely notice of appeal on the issue of collateral estoppel, seeking a ruling from the Third Circuit that Topps would not have to relitigate an issue already decided in its favor. Fleer moved to dismiss the appeal on the grounds it was not taken from a final decision and this motion was granted by the Third Circuit. App. A. Finally, on January 3, 1978, the court of appeals denied Topps' petition for a rehearing and suggestion for a rehearing en banc.

REASONS FOR GRANTING THE WRIT

1. Introduction

This case squarely presents the question of whether a pretrial order which rejects a collateral estoppel defense, thereby requiring litigation of an issue claimed to have already been litigated, is immediately appealable as a final decision under 28 U.S.C. § 1291. The decision below dismissing Topps' appeal is a surprisingly rapid departure from this Court's recent decision in *Abney* v. *United States,* 431 U.S. 651 (1977), which held that similar orders rejecting the double jeopardy defense are immediately appealable under the "collateral order" doctrine formulated in *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). It also conflicts with decisions of other courts of appeals which have found similar orders to be immediately appealable under the same doctrine.

[3] The court refused to clarify this apparent inconsistency on Topps' motion for reconsideration, although it did certify the issue of standing to the Third Circuit pursuant to 28 U.S.C. § 1292(b). App. C. Subsequently, however, the court of appeals refused to hear that interlocutory appeal.

If the decision of the Third Circuit in this case goes unreviewed by this Court, and if a party must be subject to an entire lawsuit before an appellate determination of the right not to relitigate is obtained, it would tend to effectively destroy the protection that the doctrine of collateral estoppel affords against vexatious litigation, which this Court has identified as an "extremely important principle in our adversary system of justice." *Ashe* v. *Swenson,* 397 U.S. 436, 443 (1970).[4] Moreover, that decision has the effect of endorsing a modification of the rule of appealability recently announced by this Court in *Abney, supra.* The case clearly involves an important question of federal law which has been decided by the Third Circuit in a manner that appears to conflict with decisions of this Court and other courts of appeals and the writ must be granted to remedy this situation.

2. The "Collateral Order" Doctrine In The Supreme Court

The "collateral order" doctrine, which is the basis for Topps' appeal in this case, was originally formulated in *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). In that case, the issue was whether a state statute requiring a plaintiff to post security for the costs of shareholder litigation applied in a federal diversity suit. The district court denied defendant's motion to require such security and imme-

[4] In addition to the important principle of collateral estoppel, failure of a federal court to give preclusive effect to issues already decided in state litigation would amount to a violation of the constitutional full faith and credit provision as well as federal statute. American Surety Co. v. Baldwin, 287 U.S. 156, 166 (1932). Although this case does not involve a state court judgment, the issue does serve to highlight the overriding importance of the appealability question to the administration of justice in the federal system.

diate appellate review was sought. Acceptance of appellate jurisdiction under section 1291 was affirmed by the Supreme Court. The Court recognized that Congress intended section 1291 to be given a "practical rather than a technical construction" and that it not only applies to those decisions which terminate a cause of action but also to those "[w]hich finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546. The Court reasoned that if review of the order was postponed until after trial the statutory right defendant sought to protect, *i.e.,* the assurance that it could recover the costs of suit if it prevailed by requiring plaintiff to post security for such costs beforehand, would be irreparably lost.[5]

Last term, on the basis of the doctrine formulated in *Cohen, supra,* this Court recognized that the denial of a motion to dismiss an indictment on double jeopardy grounds is subject to an immediate appeal under section 1291. *Abney* v. *United States,* 431 U.S. 651 (1977). The Court relied entirely on the factors identified in *Cohen* for its findings of appealability. These same factors render appealable the district court's order in

[5] Under this so-called "collateral order" doctrine, numerous issues which do not terminate the litigation have been found by the lower courts to be immediately appealable where delay would result in abandonment of the asserted right. *See, e.g.,* McSurely v. McClellan, 521 F.2d 1024, 1032 (D.C. Cir. 1975); Samuel v. University of Pittsburgh, 506 F.2d 355 (3d Cir. 1974); Greene v. Singer Co., 509 F.2d 750, 751 (3d Cir. 1971); United States v. Wood, 295 F.2d 772 (5th Cir. 1961), *cert. denied,* 369 U.S. 850 (1962).

this case, which denied summary judgment on collateral estoppel grounds.

First, the order constitutes a final rejection by the trial court of the collateral estoppel defense. It will not be considered again by the district court until after completion of the trial. Moreover, it is collateral to and separate from the principle issue at the impending trial, *i.e.,* whether or not defendants are guilty of the antitrust violations alleged. The bar of collateral estoppel is applied regardless of the merit in plaintiff's complaint. *Milliken* v. *Meyer,* 311 U.S. 457, 462 (1940); *United States* v. *Moser,* 266 U.S. 236, 242 (1924). Finally, Topps' collateral estoppel rights would be irreparably undermined if appellate review were postponed until after final judgment. Since the issue will have already been litigated, even a verdict in Topps' favor will not restore the right not to relitigate conferred by the doctrine of collateral estoppel. *Hoag* v. *New Jersey,* 356 U.S. 464, 470 (1958). As this Court noted in *Abney* with respect to double jeopardy:

> Obviously, these aspects of the guarantee's protections [not to be forced to endure the personal strain, public embarrassment, and expense of two trials on the same issue] would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. 431 U.S. at 662.

It is therefore clear that the holding in *Abney* controls the issue presented to the Third Circuit in this case and requires reversal of its order dismissing the

appeal. The fact that *Abney* involved a criminal matter while this case is civil in nature is irrelevant to application of the "collateral order" doctrine. That doctrine was originally formulated and applied in *Cohen,* which was a civil case.[6] Moreover, *Abney* itself recognized that the doctrine "is equally applicable in both civil and criminal proceedings." 431 U.S. at 659 n.4. Finally, adherence to the policy against interlocutory appeals "has been particularly stringent in criminal prosecutions." *Id.* at 657. Therefore, if the collateral order doctrine can be applied in a criminal proceeding to prevent relitigation *a fortiori* it should be applied to foreclose relitigation of a civil matter.[7]

The fact that *Abney* involved the assertion of a constitutional right is also irrelevant to application of the "collateral order" doctrine in this case. This Court has consistently applied that doctrine to protect a litigant's rights which were not of constitutional dimensions. *See supra,* n. 6. Moreover, the similarities between double jeopardy on the one hand and *res judicata* and collateral estoppel on the other,[8] strip the constitutional right distinction of any significance. The Double Jeopardy Clause and the common law doctrines of collateral

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[6] *See also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Gillespie v. United States Steel Corp., 379 U.S. 148 (1946); Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950).

[7] *Abney* has subsequently been relied upon to render an otherwise interlocutory order appealable in a civil case. *See* Ballard v. Spradley, 557 F.2d 476, 479 (5th Cir. 1977).

[8] Collateral estoppel is a part of the broader doctrine of res judicata. Hoag v. New Jersey, 356 U.S. 464, 470 (1958); Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89, 91 (1954); Palma v. Powers, 295 F.Supp. 924, 932 n.1 (N.D. Ill. 1969).

estoppel and *res judicata* derive from common origins and serve substantially the same purposes.

Double jeopardy and collateral estoppel are both based on the same ancient maxim, *nemo debet bis vexari pro eadem causa, i.e.,* no one should be twice vexed for the same cause. *Ex Parte Lange,* 85 U.S. 163, 168-69 (1874); Sigler, A History of Double Jeopardy, 7 *American Journal of Legal History,* 283, 298 (1963). This maxim found expression at common law in the pleas of *res judicata* and collateral estoppel in civil suits and in the pleas of *autrefois acquit* and *autrefois convict*—pleas later embodied in the Double Jeopardy Clause—in criminal prosecutions. Perkins, *Criminal Law and Procedure* 650 (1952); 4 Blackstone, *Commentaries on the Law of England* 335-36 (Sharswood ed., 1873).[9] The doctrine of collateral estoppel is even embodied in the Fifth Amendment guarantee against double jeopardy. *Ashe* v. *Swenson,* 397 U.S. 436, 445 (1970).

In addition to their common origins, the doctrines of collateral estoppel and double jeopardy serve substantially the same purposes. The policy of protecting criminal defendants against the expense, anxiety and insecurity of vexatious and repetitive prosecutions by the government is embodied in the Double Jeopardy Clause of the Fifth Amendment. *Benton* v. *Maryland,* 395 U.S. 784, 796 (1969). It protects the defendant from multiple trials as well as multiple punishments. *Abney* v. *United States, supra,* 431 U.S. at 660-62. It also allows a defendant to plan his future without the

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[9] The Greeks treated the concept of double jeopardy as part of the rule of *res judicata.* United States v. Jenkins, 490 F.2d 868, 870 (2d Cir. 1973), *aff'd,* 420 U.S. 358 (1975).

threat of subsequent prosecution for the same conduct. Note, Statutory Implementation of Double Jeopardy Clauses: New Life For a Moribund Constitutional Guarantee, 65 *Yale L.J.* 339, 339-41 (1956). These considerations are also applicable to collateral estoppel which is "[d]esigned to eliminate the expense, vexation, waste, and possible inconsistent results of duplicatory litigation." *Hoag* v. *New Jersey,* 356 U.S. 464, 470 (1958).[10] It prohibits a plaintiff from assailing a defendant for proceeding without change upon a course of conduct previously held lawful against an identical attack. *Exhibitors Poster Exchange, Inc.* v. *National Screen Service Corp.,* 517 F.2d 110, 114-15 (5th Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976). Based upon the above, it is clear that this case is controlled by both *Cohen* and *Abney* and that the order of the Third Circuit, which conflicts with this binding authority, must be reversed.[11]

3. The "Collateral Order" Doctrine in the Courts of Appeals

In addition to its failure to follow controlling authority of this Court, the order of the Third Circuit rejecting Topps' attempt to assert its right to collateral estoppel effect places it in a clear conflict with another

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[10] *See also* Note, *Collateral Estoppel of Nonparties,* 87 HARV. L. REV. 1485, 1499 (1974); Comment, *Nonparties and Preclusion By Judgment: The Privity Rule Reconsidered,* 56 CALIF. L. REV. 1098, 1099 (1968).

[11] As this Court has most recently recognized, "[s]tatutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered. . . ." Mathews v. Eldridge, 424 U.S. 319, 331 n.11 (1976). Therefore, a strict construction of section 1291 which would conflict with the previous holding in *Abney* should be avoided.

federal court of appeals on this issue. In two cases, the Eighth Circuit has held that pretrial orders determining the collateral estoppel effect to be given prior judicial proceedings are immediately appealable under section 1291 pursuant to the "collateral order" doctrine. *See In re Piper Aircraft Distribution System Antitrust Litigation,* 551 F.2d 213 (8th Cir. 1977); *United States* v. *Barket,* 530 F.2d 181 (8th Cir. 1975), *cert. denied,* 429 U.S. 917 (1976). The principle established by the order of the Third Circuit in this case is directly contradictory to that announced by the Eighth Circuit. Given the clear split of authority, this case represents an appropriate and necessary opportunity for the Court to ensure compliance with its construction of section 1291 in *Abney.*

In several other appellate court decisions, the principles of *Cohen* and *Abney* have been applied to issues similar in effect to collateral estoppel to render them immediately appealable. In *In re Cessna Distributorship Antitrust Litigation,* 532 F.2d 64 (8th Cir. 1976) the trial court denied defendant's attempt to file a cross-claim. In allowing an immediate appeal from this denial, the court of appeals recognized that "[t]he granting of the motion to amend in order to allow the cross-claim would materially reduce the range and cost of litigation, a primary purpose of Fed.R.Civ.P. 13 (g). The potentially substantial saving in judicial time gives added weight to the claim that the order appealed from presents a question of special importance." *Id.* at 67. *See also Herbst* v. *International Telephone and Telegraph Corp.,* 495 F.2d 1308, 1313 (2d Cir. 1974).

In *Local 771, I.A.T.S.E., AFL-CIO* v. *RKO General, Inc., WOR Division,* 546 F.2d 1107 (2d Cir. 1977) defendant's motion to dismiss, in which it was claimed

that arbitration was plaintiff's exclusive remedy, was denied. Comparing this issue to that presented by double jeopardy, the court accepted jurisdiction of an immediate appeal, holding that "[t]he Company's right to be relieved of the costs and delays of trial which it claims to have gained through the contract's arbitration provisions, will be lost irretrievably if proceedings in the case go forward in the district court." *Id.* at 1112. Although not dealing with collateral estoppel, these cases do recognize that legal issues whose very purpose is to avoid the costs and time of trials are to be immediately reviewable through appeal. As such, when compared to the Third Circuit's decision in this case, they represent a conflict among the federal courts about the application of the "collateral order" doctrine which should be resolved by this Court.

4. Importance of the Underlying Issue

Collateral estoppel is a substantive right granted to each litigant. It is not merely a matter of practice or prudent judicial administration, but rather a "rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts." *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299 (1917). It is a substantive right granted to each litigant, *Fayerweather* v. *Ritch*, 195 U.S. 276, 299 (1904), and is an "extremely important principle in our adversary system of justice." *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970). Moreover, orders of the Federal Trade Commission are designed to protect the public interest and to guide the future conduct of businessmen. *In the Matter of Topps Chewing Gum, Inc.*, 67 F.T.C. 835, 837 (F.T.C. 1965). If these purposes are to be achieved

immediate review is necessary in this case to protect Topps and others from the risk of conflicting judgments.

Therefore, collateral estoppel, like double jeopardy, is a right which is "too important to be denied review" by requiring defendants to relitigate issues in a trial before an appeal. The finality rule should not be applied in such a manner as to render appellate review on this issue an empty ritual.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

November 18, 1977

No. 77-2428

FLEER CORPORATION

vs.

TOPPS CHEWING GUM, INC., et al.
MAJOR LEAGUE BASEBALL PLAYERS' ASSOCIATION

Topps Chewing Gum, Inc. and
Major League Baseball Players Association, Appellants

(D.C. Civil No. 75-1803)

Present: GIBBONS and VAN DUSEN, Circuit Judges.

1. Motion by appellee, Fleer Corporation, to dismiss appeal taken from the Orders dated June 6, 1977 and October 3, 1977 of the United States District Court for the Eastern District of Pennsylvania, because the orders appealed from are not final judgments and are not final orders,

2. Appellants' opposition to motion by appellee, Fleer Corporation, to dismiss appeal,

in the above listed for Monday, November 28, 1977, or as the Court decides.

Respectfully,
/s/ SIGNATURE NOT LEGIBLE
Clerk

enc.
fm

The foregoing Motion is *granted.*

By the Court,
/s/ JOHN J. GIBBONS
John J. Gibbons
Judge

Dated: December 1, 1977

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 75-1803

FLEER CORPORATION

v.

TOPPS CHEWING GUM, INC

and

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION

Memorandum and Order

Newcomer, J. June 6, 1977.

In this antitrust action, Fleer Corporation ("Fleer") has charged Topps Chewing Gum, Inc. ("Topps") and the Major League Baseball Players Association with violations of the antitrust laws in connection with the production and sale of baseball trading cards and similar products. After limited discovery, the defendants have moved for summary judgment on three issues: 1) whether Fleer has standing to sue; 2) whether Fleer's action has been brought within the statute of limitations period; and 3) whether Fleer's claim is barred by a prior Federal Trade Commission proceeding under the common law doctrine of collateral estoppel. We shall discuss each issue below, and for reasons set forth therein, deny the motion for summary judgment.

STANDING

Under 15 U.S.C. § 15 (Section 4 of the Clayton Act), a suit for treble damages may be brought by "any person who shall be injured in his business or property" by an antitrust violation. The courts have attempted to limit the scope of this statute and "(i)n so doing, (they) have developed a standing doctrine 'peculiar to antitrust actions.' "

Bravman v. Basset Furniture Industries, Inc., C.A. No. 76-1003, Slip. Op. at 13, (3d Cir., February 16, 1977), *quoting Malamud v. Sinclair Oil Corp.*, 521 F. 2d 1142, 1148 (6th Cir. 1975). In the *Bravman* decision, the Third Circuit reviewed its prior decisions on antitrust standing. In lieu of endorsing any particular test for § 15 standing, the Court chose the balancing approach favored by Judge Garth in *The Cromar Company v. Nuclear Materials and Equipment Corp.*, 543 F. 2d 501, 506 (3d Cir. 1976).

> "Each case, therefore, must be carefully analyzed in terms of the particular factual matrix presented. In making this factual determination courts must look to, among other factors, the nature of the industry in which the alleged antitrust violation exists, the relationship of the plaintiff to the alleged violator, and the alleged effect of the antitrust violation upon the plaintiff."

In *Bravman,* Judge Gibbons said the Cromar approach resulted in the district court performing what is "essentially the balancing test comprised of many constant and variable factors . . . (T)here is no talismanic test capable of resolving all (§ 15) standing problems." Slip Op. at 19.

In viewing the case at bar under the summary judgment constraints, we find that plaintiff does indeed have standing to sue under the antitrust laws. In this arena of baseball trading cards, as parties acknowledged on oral argument, what is at issue is the contract rights for trading cards. Topps holds most of these rights through exclusive contracts with the individual players. Fleer sought to enter the market in a variety of ways, including negotiation for a group license with the Players' Association. The nature of such a market would mean that a party without contract rights would be helpless, unable even to attempt to compete through production. Therefore, an effort by Fleer to get those contract rights would meet the standing requirements.

The lack of any substantial financial investment in the market by Fleer must be balanced against its expert's conclusion that it would cost Fleer $1.75 million to attempt an unopposed entry into the market.

The relationship of the plaintiff to the alleged violator, Topps, is one of potential competitor-to-competitor. This case, therefore, is much more within the traditional scope of the antitrust laws than *Bravman,* which gave standing to sales agents of the defendant, or *International Ass'n, Etc. v. United Contractors, Etc.,* 483 F.2d 384 (3d Cir. 1973), which granted standing to employees to sue their employers' competitors. We have previously rejected defendants' proposal that a plaintiff must have an actual going business in order to sue for treble damages, *Fleer Corp. v. Topps Chewing Gum, Inc.,* 415 F. Supp. 176, 180 (E.D. Pa. 1976). It would appear that even a potential competitor who possesses all but one essential element for entry into competition[1] would have standing under the balancing test. In *Bravman* and *Cromar, supra,* the Third Circuit expressly rejected the "competitors only" standing test. As we noted earlier, 415 F. Supp. at 180:

> "It would be inconsistent with one purpose of the Clayton Act—to protect the business interests of the victims of monopolistic practices—to require an antitrust plaintiff to pay a courtroom entrance fee in the form of an expenditure of substantial resources in a clearly futile effort."

In this case, the alleged effect of the antitrust violation is to totally block Fleer from the market, rather than merely to diminish its profits. Where attempted entry into the

[1] Fleer has the manufacturing equipment to make the cards and has the staff needed to bid for the contracts at this time. All that is lacking is free access to the contract rights, they claim.

market would be futile[2], this Court cannot impose such a prohibition to access to the courts.

Collateral Estoppel

Defendants claim that Fleer is bound by the common-law doctrine of collateral estoppel from litigating this case. In 1965, the Federal Trade Commission issued an opinion holding that there was no commercially meaningful market in baseball cards. If Fleer is bound by this holding, the action here is precluded by the earlier judgment, since the market issue is an essential element of Fleer's case, *United States v. E. I. Dupont de Nemours and Co.,* 353 U.S. 586 (1957); *Fleer, supra* at 182.

Defendants contend that Fleer is bound by this earlier decision because it participated in the control of the earlier litigation.

> "A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in . . . the determination of a question of fact of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound." Restatement of Judgments, § 84, *quoted in Ransburg Electro-coating Corp. v. Lansdale Finishers, Inc.,* 484 F. 2d 1037 (3d Cir. 1973).

The question of control is one of fact, *Ransburg, supra,* and must be affirmatively proven by the party seeking to invoke the judgment as an estoppel. *Ransburgh v. Auto-*

[2] The hearing examiner in the 1966 Federal Trade Commission proceeding against Topps, noted that other potential competitors had been kept out of the market by Topps' extensive contracts. In the Matter of Topps Chewing Gum, Inc., initial decision, Docket No. 8643 at 45 (Slip Op. at 45, August 7, 1964).

matic Finishing Suppliers, Inc., 412 F. Supp. 1357 (E.D. Pa. 1976). After the Court has allowed extensive discovery on this issue, defendants have failed to come forward with any concrete evidence of Fleer's controlling activity. Defendants rely in chief on a paragraph in the Hearing Examiner's report, which states:

> "Fleer's representatives were star witnesses and, in proportion, carried the burden of making the record in this proceeding. They were in constant attendance throughout the hearing. Even before the hearing, one of the baseball players, in response to a question put by [FTC] counsel during the taking of a deposition said, referring to Fleer, "Well, a representative of your [FTC's] company asked me to get a copy of the contract . . . I am sorry, Fleer's." (CX 2, Cheney, Page 25).[3] Docket No. 8463, Initial Decision (August 7, 1964)

These facts, alone, would not show that Fleer had control over the litigation. It is inadequate evidence of control to show "that the non-party provided counsel or procured witnesses or evidence unless by such assistance he acquired the requisite degree of control." *Ransburgh*, 412 F. Supp. at 1364. Here, plaintiff quotes the FTC Hearing Examiner to rebut any inference of control which could be made from Fleer's assistance to the FTC:

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[3] Defendants misinterpret the rest of that paragraph as an admission by the Examiner of Fleer's *de facto* control of the case. The Court does not read it that way. The Examiner merely points out that, although competition in baseball cards is primarily limited to a private Fleer-Topps battle (rather than involving a larger field of competitors), the FTC might still wish to pursue its prosecution of the case in the public interest. The Examiner has not been given the Commission's policy-making functions, but has only been delegated its fact-finding role. Therefore, he cannot make these policy decisions as to when to prosecute. It was this Commission-to-Examiner delegation that is referred to rather than any delegation of power to Fleer.

> "Mr. Harris (Topps' counsel), I wish in the future you would not treat this case as a case between Fleer and Topps. If you want to treat it as a case between Fleer and Topps, it could very easily be decided against you very quickly.
>
> "I think that this is a case against Topp with the Federal Trade Commission being the complaintant, and we are concerned with the public interest and not with Fleer's interest, except only to the extent that Fleer's might be a part of the public which should be protected." (Tr. at 522-523).

Defendants contend that Fleer should be barred because it could have intervened as a party, but did not do so. The Court does not agree that this decision should bind Fleer as if it had been a party. One who chooses to intervene is bound by any resulting judgment, but even existence of an absolute right of intervention does not subject a non-party to estoppel. *United States v. Cohen*, 271 F. Supp. 709 (S.D. Fla. 1967).

Defendants finally argue that plaintiff's failure to exercise its right to appeal under § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702, requires that it be bound by the Commission's decision. In *Pepsico, Inc. v. FTC.*, 472 F. 2d 179 (2d Cir. 1972), that court ruled that non-parties to a FTC action could appeal a decision since they were "adversely affected or aggreived by action agency" under the APA. In *Ransburgh*, Judge Ditter said:

> "The prerogative to decide whether or not to appeal from an adverse [decision] is crucial to, and indicative of, control." 412 F. Supp. at 1364.

However, to bind persons for failing to bring up an agency decision for review when they were not involved as party to it in the first instance would be to broaden the scope of collateral estoppel unduly. This would impose a tremendous

burden on non-litigants to remain aware of all agency actions which might pertain to their interests. This Court does not believe that this right of appeal is indicative of any control a non-party has over the agency litigation. The "control" that Judge Ditter spoke of was the ability to continue an on-going case. The APA "appeal" would constitute a new case, brought by a new party, who may have no role at all in the first action.

Since defendants have failed to produce any facts which would be probative of Fleer's *de facto* participation in the control of the FTC litigation, this Court finds that it has failed to meet its burden on this affirmative defense.

STATUTE OF LIMITATIONS

Defendants have argued that the plaintiff's case is barred by the statute of limitations. Plaintiff contends that activity of the defendants within the four-year limitations period violated the antitrust laws. The Court finds that, since numerous material facts remain in issue on this topic, summary judgment is not appropriate.

/s/ CLARENCE C. NEWCOMER, J.
Clarence C. Newcomer, J.

(CAPTION OMITTED IN PRINTING)

Order

AND NOW, to wit, this day of June, 1977, for reasons set forth in the accompanying memorandum, the defendants' motion for summary judgment is hereby DENIED.

AND IT IS SO ORDERED.

/s/ CLARENCE C. NEWCOMER, J.
Clarence C. Newcomer, J.

APPENDIX C

(CAPTION OMITTED IN PRINTING)

(FILED SEPTEMBER 30, 1977)

Memorandum and Order

Newcomer, J. September 22, 1977.

Defendants, in this antitrust case, have moved for reconsideration of this Court's denial of their summary judgment motion, or in the alternative, certification of one issue for appeal under 28 U.S.C. § 1292. The Court has reviewed its decision denying summary judgment and the briefs submitted in this proceeding. The motion for reconsideration will be denied, but the request for certification will be granted.

The plaintiff, Fleer Corporation, contends that Topps Chewing Gum, and the Major League Baseball Players Association conspired together to allow Topps to obtain a monopoly of the baseball trading card industry. In the summary judgment motion, the defendants raised three defenses for the Court's consideration, after discovery had been completed on the issues. First, defendants claimed that Fleer's suit is barred by the statute of limitations. Second, they contended that the case is barred under the doctrine of collateral estoppel by a 1966 proceeding against Topps by the Federal Trade Commission. Finally, they argued that Fleer lacks standing to bring a suit for treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15.

On the issue of collateral estoppel, defendants now contend that the Court erred in rejecting this defense. In its opinion of July 6, 1977, the Court held that Fleer did not "control" the Federal Trade Commission (FTC) prosecution, and therefore could not be bound by it. Defendants argue that the so-called "control" test, as enunciated in *Ransburg v. Automatic Finishing Systems*, 412 F. Supp. 1357 (E. D. Pa. 1976), somehow is different from and con-

flicts with the Court of Appeals opinion in *Scooper Dooper v. Kraftco*, 494 F. 2d 840 (3rd Cir. 1974). In that case, the appellate court held that collateral estoppel is available as a defense if the party against whom it is asserted "has had a full and fair opportunity to present his claim in the the prior litigation . . ." 494 F. 2d at 844. This Court believes that these two inquiries seek the same information and reach the same conclusion. The "control" test is merely a different way of framing the question. Therefore, the Court sees no reason to change its decision on this issue, since it believes it is consistent with the law in this circuit.[1]

On the issue of the statute of limitations, defendants contend that the Court failed to comply with a requirement of Fed. R. Civ. P. 56. If, after considering a summary judgment motion, it is denied and a trial is needed, "the court . . . shall *if practicable* ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted." Rule 56(d) (Emphasis added). This is not mandatory under the rule and is discretionary in any situation. In this case, resolution of the statute of limitations issue requires adjudication of much of the merits of the case, in order for the Court to decide if activity within the time period was a violation of the antitrust laws. Therefore, to attempt to list the many facts still in controversy would be a heavy burden on the Court at this time. Furthermore, such a list would surely be incomplete and misleading to counsel, since all the evidence to be presented at trial is not yet entirely before the Court.

Finally, defendants contend that the Court erred in using the standing standard recently enunciated in *Bravman v. Basset Furniture Industries, Inc.*, CCH 1977 Trade

[1] The defendants have stated to the Court that they intend to seek direct review on this question before the Court of Appeals. No certification has been requested on this issue.

Cases, ¶ 61,380 (3d Cir. February 16, 1977). This Court believes that the generalized *Bravman* test is applicable in deciding if Fleer is able to sue for treble damages as an injured party under Section 4. This Court believes that this issue was properly decided, but is an appropriate one for certification under 28 U.S.C. § 1292(b).

In the Third Circuit, the key case under § 1292(b) is *Katz v. Carte Blanche Corp.*, 496 F. 2d 747 (3d Cir. 1974) *cert. denied*, 419 U.S. 885 (1974). In that case, the appeals court noted that the statute imposes three criteria governing the district court's exercise of discretion. The first is that the issue to be certified must involve "a controlling question of law." The Court of Appeals has defined that as "one which would result in reversal of a judgment after a final hearing." 496 F. 2d at 755. In *Obron v. Union Camp Corp.*, 477 F. 2d 342 (7th Cir. 1973), that appellate court sustained a district court's certification of a similar standing issue in an antitrust case as a controlling question. The question certified by the district court was whether appellant had suffered injury, since he had passed on to his customers any artificially high prices. That issue is very similar to the standing question presented here, where defendants claim that Fleer has not been injured because it had not actually entered into the market in competition with Topps. Both of these issues pertain to a plaintiff's right to claim treble damage under Section 4 of the Clayton Act. An erroneous decision by a district court on an issue so central to the posture of the case would result in reversal. Therefore, as did the Seventh Circuit in *Obron*, this Court believes that standing is a "controlling question" in antitrust cases

In *Katz*, the appellate court discussed the legislative history of § 1292(b). Judge Maris, in his testimony before Congress, suggested that " 'controlling' means serious to the conduct of the litigation, either practically or legally." 496 F.2d at 755. As explained above, the Section 4 standing

issue has serious legal import in this antitrust case. It also has significant practical impact on the duration of the case. If plaintiff does not have the right to pursue treble damages, the trial in this case will undoubtedly be considerably shorter. This is a very important consideration in a district court's decision to certify, as recognized in *Katz*. "(S)aving of time of the district court and of expense to the litigants was deemed by the sponsor to be a highly relevant factor (in certifying an appeal)." 496 F. 2d at 755. Since this issue controls both the legal and practical facets of the case, this Court holds that the first criterion of § 1292(b) is satisfied.

Second, the statute states that the issue to be certified must offer "substantial ground for difference of opinion" as to its correctness. 28 U.S.C. § 1292(b). As the Court of Appeals noted this requirement presents "little difficulty" for the district court. 496 F. 2d at 754. Here, defendants strenuously oppose the Court's use of the *Bravman* analysis, which has resulted in decision that Fleer has Section 4 standing. Plaintiff, of course, supports the *Bravman* analysis. Since the *Bravman* opinion is based on different facts and can arguably be limited to standing questions different from the one at bar, application of that standard to this case is a decision which offers grounds for substantial divergence of opinion.

Finally, the last statutory criterion, that an immediate appeal will "materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), is also satisfied in the instant case. As noted above, a decision contrary to this Court's holding would significantly shorten the length of trial, since the treble damages issue would then be excluded. Furthermore, due to the defendants' intent to take a direct appeal on the collateral estoppel issue at this time, the trial will be postponed in any event until that appeal is decided. Therefore, this standing appeal, which could be heard at the same time as the collateral estoppel issue, would certainly not add any further delay to the progress of trial.

Since this issue of standing clearly satisfies the criteria of § 1292(b), as the Seventh Circuit found in a similar case, *Obron* v. *Union Camp Corp., supra*, it will be certified for interlocutory appeal. In all other respects, defendants' motion for reconsideration will be denied.

/s/ CLARENCE C. NEWCOMER, J.
Clarence C. Newcomer, J.

(CAPTION OMITTED IN PRINTING)

Order

AND NOW, to wit, this 22nd day of September, 1977, the defendants' motion for reconsideration of the Court's June 6, 1977 memorandum and order is hereby DENIED. However, their motion for certification under 28 U.S.C. § 1292(b) is GRANTED. The following question is certified for appeal under the provisions of that statute:

> Whether plaintiff Fleer Corporation has standing to sue under 15 U.S.C. § 15 for treble damages, under the decision in *Bravman v. Basset Furniture Industries, Inc.*, CCH Trade Cases 1977, paragraph 61,300, (3d Cir. February 16, 1977).

AND IT IS SO ORDERED.

/s/ CLARENCE C. NEWCOMER, J.
Clarence C. Newcomer, J.